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Via Electronic Mail

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W. – Portals
Washington, DC 20554

Re: Application by Verizon-New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a) Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc. and Verizon Select Services Inc., for Authorization to Provide In-Region InterLATA Services in State of New Jersey
WC Docket No. 02-67

Dear Ms. Dortch:

The within are the reply comments of the New Jersey Cable Telecommunications Association ("NJCTA") to the comments filed by other parties in this matter ("New Jersey II Application"); to the New Jersey Board of Public Utilities' Consultative Report ("Consultative Report II")[1]; and, to the Evaluation of the United States Department of Justice ("DOJ Evaluation II")[2], in this matter. The NJCTA has previously file comments and reply comments in connection with Verizon New Jersey's earlier application ("New Jersey I Application").[3] Additionally, the NJCTA filed comments in response to the Commission's Public Notice of March 8, 2002 regarding the *ex parte* filing in the New Jersey I

[1] Filed on April 4, 2002.
[2] Filed on April 15, 2002
[3] See, *Comments of the New Jersey Cable Telecommunications Association to the Application of Verizon New Jersey, Inc. (Verizon NJ) for Approval to Provide In-Region Long Distance Services*, ("NJCTA Initial Comments") filed on January 14, 2002; and, *Reply Comments of the New Jersey Cable Telecommunications Association to the Application of Verizon New Jersey, Inc. (Verizon NJ) for Approval to Provide In-Region Long Distance Services*, ("NJCTA Reply Comments") filed on February 1, 2002.

Application proceeding by the New Jersey Board of Public Utilities ("NJBPU") of what it characterized as its "Final Order"[4] concerning rates for unbundled network elements ("UNEs").[5] All of the previously submitted comments on behalf of the NJCTA in connection with the New Jersey I Application are incorporated herein by reference.

On April 4, 2002, the NJBPU submitted its consultative report ("Consultative Report II") in this matter. The report is notable for its brevity – little more than a single substantive page in length. While the NJBPU reiterates the conclusions reached in its consultative report filed in connection with New Jersey Application I ("Consultative Report I") and its reliance upon that report, it expressly notes that those conclusions are contingent upon "the conditions described therein."[6] Further, "[t]he Board reiterates its previously expressed public interest concern regarding the lower than anticipated level of residential competition."[7]

Key, of course, in the Commission's determination of VNJ's compliance with the checklist set out in the Telecommunications Act of 1996 is the efficacy or lack thereof, of the NJBPU's Final Order with respect to UNE rates. We noted in our previously filed comments that there was concern regarding the legal effect of the rates upon which VNJ relied in its New Jersey I Application.[8] In Consultative Report II, the NJBPU "notes that in the UNE Proceeding, Motions for Reconsideration of specific determinations will be closely scrutinized by this Board. If appropriate, additional measures will be taken to further encourage local entry by competitors of Verizon NJ."[9]

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[4] *I/M/O the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc.* Docket No. TO00060356 (Decision and Order, released March 6, 2002) – "Final Order,"
[5] *See* letter dated March 12, 2002, to William F. Caton on behalf of the NJCTA in the New Jersey I Application proceeding.
[6] Consultative Report II, p. 2.
[7] *Id.*
[8] We specifically noted the procedural concerns raised by the NJBPU relying for its final determination upon information submitted by VNJ after the close of all hearings without the prior opportunity for parties to review and examine such submissions. *See,* NJCTA Initial Comments in New Jersey I Application proceeding, p. 5, fn. 8.
[9] Consultative Report II, p. 2.

DOJ Evaluation II, filed on April 15, 2002, also offers much less than enthusiastic support for the New Jersey Application II. It expresses concern for the duration of the reductions in hot cut rates implemented by VNJ, and further notes that "there are issues concerning nondiscriminatory access to Verizon's OSS in New Jersey that may warrant further scrutiny by the Commission."[10] The evaluation continues:

> [t]he Department concludes that Verizon has *generally* succeeded in opening its local markets in New Jersey to competition and recommends approval of Verizon's application for Section 271 authority, *subject, however, to the Commission satisfying itself as to the pricing and OSS issues discussed* [later in the evaluation.][11]

The Department of Justice ("DOJ") specifically raises concerns about the appropriateness of the level of wholesale rates and questions the binding effect of the promise of an applicant to lower rates.[12] The DOJ expressly reinforces the concerns expressed in its evaluation of New Jersey Application I regarding "problems experienced by CLECs in obtaining accurate and auditable bills" for wholesale services.[13]

The DOJ notes that although "there is little evidence in the record to quantify the competitive harm caused by the deficiencies in Verizon's billing system" it recommends that "the Commission monitor Verizon's wholesale billing system."[14]

The DOJ goes on to state:

> "Persuasive evidence that Verizon had significantly raised CLECs' costs by failing to fulfill a competitive checklist obligation would be a basis for recommending denial of its application. Although the evidence on the record of this proceeding does not appear to rise to that level, it certainly warrants continued scrutiny by the Commission."[15]

[10] DOJ Evaluation II, p. 3.
[11] *Id.*, emphasis added.
[12] *Id.*, p. 4.
[13] *Id.* p. 5-6.
[14] *Id.* p. 7.
[15] *Id.* p. 7.

Two observations are prompted by the quoted DOJ comment: first is the fact that the burden is on VNJ to demonstrate that it has irreversibly opened the market for competition,[16] not others to provide "persuasive evidence" that VNJ had "significantly" raised CLECs' costs. Further, an unwarranted increase in CLEC costs does not have to be "significant" to raise the barrier to competition enough to preclude effective competition – a small increase may just be the straw that breaks the camel's back, or in this case, make the barrier just high enough to preclude entry by competitors.

Of special note to the Commission should be the comments and position of the New Jersey Division of the Ratepayer Advocate ("NJRPA"), the one party to the proceedings before the NJBPU whose only interest is the protection of the consumer. It holds, in comments filed on April 8, 2002, that VNJ has failed to satisfy all checklist requirements; that the Commission may not rely upon the NJBPU UNE Final Order; and, that VNJ's application fails to serve the public interest, in that approval will not promote competition, and that the market is not now open to competition, as evidenced by the extremely small percentage of the local residential market now being served by competitors. The NJCTA is in accord with NJRPA's position.

In order to comply with checklist item 2, VNJ must demonstrate that the rates for wholesale services are TELRIC compliant. An essential element of that demonstration is the establishment of the efficacy of the NJBPU Final Order on UNE rates. In our filings in the New Jersey I Application proceeding, we noted that rates were not legally effective because a "final order" had not been issued at the time of the submission of VNJ's application. (Indeed, a "final order" was not promulgated until very near the end of the time period within which the Commission was required to act.) We also noted that the rates established in the Final Order were the result of post hearing submissions to the NJBPU by VNJ and

[16] I/M/O Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania: Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269 (rel. Sep. 19, 2001), App. C, Statutory Requirements, para. 5 [the burden of proving compliance with each and every one of the checklist items rests with Verizon NJ even if no other party challenges].

manipulation of the data provided without the opportunity of review and examination by the parties to that proceeding. We noted that the rate levels set out are subject to appeal and alteration, and now, as set forth in the NJBPU Consultative Report II, we see that the rates may be further altered as the result of the submission of motions for reconsideration before the NJBPU.[17]

One of the conditions upon which Consultative Report I is based is that VNJ covenant not to challenge the rates established by the NJBPU.[18] Additionally, the specific terms of the Final Order require that VNJ not mount a challenge to the rates established therein. VNJ has expressly refused to acquiesce to that requirement. Further, the rates established under the Final Order are still subject to appeal by any party.[19] Given VNJ's adamant refusal to agree not to challenge the Final Order, it is not beyond reason to conclude that it has every intention to do so, though it may well plan to do so after the time within which it anticipates 271 approval from the Commission. Under the circumstances, the Commission cannot rely on the efficacy of the Final Order to satisfy itself that the rates established therein are TELRIC compliant.

VNJ protests that because the NJBPU conducted a proceeding that included some 17 days of hearing, that it responded to some 750 discovery requests, and that the NJBPU issued a 279 page Final Order, the Commission can conclude that the rates are TELRIC compliant.[20] VNJ neglects to acknowledge that the job, no matter how much time was taken or how much paper was produced, was never properly completed. The post hearing inputs from VNJ and the implementation by NJBPU staff without review and examination by other parties skews all that went before.

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[17] Consultative Report II, p. 2.
[18] NJCTA Initial Comments, p. 7. An added vexing issue is the requirement of the Final Order that Verizon NJ waive, not later than March 12, 2002, its right to challenge the UNE rates set out therein. Final Order p. 279. A motion for such a directive, made by several parties before the NJBPU, met with the response from Verizon NJ that "there is no basis in the record or in the relevant provisions of the Telecommunications Act for AT&T's unwarranted demand." Verizon NJ letter to Kristi Izzo, NJBPU Secretary, March 11, 2002.
[19] Under the rules of court in New Jersey notice of appeal may be filed at least up until on or about April 22, 2002. It is unclear whether there is a similar time restriction for a federal challenge.
[20] Ex Parte submission by VNJ, April 17, 2002, reported by VNJ by letter of April 18, 2002.

Finally, the Commission should not fail to take notice of the miniscule level of competition that presently exists for the provision of local residential service.[21] It seems beyond credulity to argue that with over 100 CLECs[22] authorized, and presumably committed, to providing service in New Jersey, that the market is open to competition when so few customers are being served. Economic common sense dictates that if an enterprise is dedicated to the provision of such service it will do so if the market is really open to competition. Simply, from all that appears, VNJ, by keeping the costs of entry high through all of the devices complained of by the more substantial CLECs, has effectively kept the market closed.

The public interest requires that competitive entry must be truly open before VNJ is permitted to use its monopoly position as a base to invade the long distance market. Prematurely allowing VNJ to do so will likely be the death knell of most CLECs, whereas continuation of the status quo until markets are truly open can hardly be thought to so endanger VNJ and its affiliated companies.

The Commission should reject VNJ's application because it cannot yet meet all checklist requirements and because allowing VNJ to provide in-region long distance service at the present time is not in the public interest.

Respectfully submitted,

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[21] *See, e.g.,* Comments of NJRPA, p. 3.
[22] Conversation with NJBPU staff, April 19, 2002. Actually, it was reported that there were some 125 authorizations issued, but that a number of the companies have either gone into bankruptcy or have determined not to provide service in New Jersey.

cc: Service List
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S. Pie
J. Swift
John Lynch, DOJ